IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.755 OF 2000

The Commissioner of Income-tax,
Mumbai City - XIII, Aayakar
Bhavan, 4th Floor,
Mumbai .. Appellant.

V/s.

Roshanbabu Mohammed Hussein Merchant
C-3, Palm Spring,
Cuffe Parade, Colaba,
Mumbai - 400 005 .. Respondent.

Mr.R.V. Desai, senior advocate with Ms.S.V. Bharucha and Mr.Pankaj Kapoor for the appellant.

Mr.V.H. Patil, senior advocate with Ms.Aasifa Khan i/b. Mr.Sunil M. Lala for the respondent.

ALONG WITH
INCOME TAX APPEAL NO.603 OF 2000

Fancy Corporation Limited,
having its office at 16,
Bombay Samachar Marg,
Mumbai - 400 001 .. Appellant.

V/s.

1. Dy. Commissioenr of Income-tax, Special Range - I, having its office at Aaykar Bhavan, M.K. Road, Mumbai - 400 020.

2. Commissioner of Income-tax, Bombay City having its office at Aaykar Bhavan, M.K. Road, Mumbai 400 020. .. Respondents.

Mr.V.H. Patil, senior advocate with Mr.J. Jain with Ms.Falguni Thakkar i/b. Rustomji Ginwala for the Appellant.

Mr.R.V. Desai, senior advocate with Ms.S.V.

Bharucha & Mr.Pankaj Kapoor for the Respondents.

CORAM : S. RADHAKRISHNAN &
J.P. DEVADHAR, JJ.

DATED : 31ST JANUARY, 2005.

ORAL JUDGMENT : (Per J.P. Devadhar, J.)

1. The issue raised in these two tax appeals, one filed by the revenue and the other filed by the assessee being common, both these appeals are heard together and disposed of by this common judgment.

2. Although two questions have been raised in these two appeals, Mr.Patil, learned senior advocate appearing on behalf of the assessee in both these appeals fairly stated that in the light of the decisions of the Apex Court in the case of CIT V/s. Attili N. Rao (252 ITR 880), he is not pressing the question relating to the deduction of the amount paid to discharge the mortgage debt as income diverted at source by overriding title. Therefore, the only substantial question to be considered in these two appeals is :

> "Whether the repayment of the mortgage debt created by the assessee, is an expenditure incurred in connection with

the transfer of mortgaged asset allowable under Section 48(i) of the I.T. Act?"

3. For the sake of convenience, we set out the relevant facts pertaining to Tax Appeal No.755 of 2000. The said appeal relates to the Assessment Year 1990-1991. In that case, the assessee was shareholder of a company known as Merchant Steel Industries Private Limited in which her husband was a director. The assessee owned a plot of land at Bhavnagar admeasuring 2992.99 square yards. The said Merchant Steel Industries Private Limited had raised a loan from the State Bank of Saurashtra and for the repayment of the said loan, the assessee stood as one of the guarantors and the assessee had offered the above plot of land as security for repayment of the loan. As the said company failed to pay the loan, the Bank filed a suit against the company and on November 19, 1986 consent terms were arrived at in the said suit and as per the said consent terms, the bank was to have a negative lien over the assessee’s aforesaid plot of land which was given as collateral security for the loan and the said lien was to remain operative till the bank’s dues were fully paid.

4. During the relevant year, the assessee, after obtaining permission from the bank, sold a part of the aforesaid land for a consideration of Rs.3,92,000/- and deposited the entire amount of Rs.3,92,000/- with the State Bank of Saurashtra towards discharge of the debt. The assessee claimed that the long term capital gain arising on sale of the above land was exempt from Capital Gains Tax. The assessing officer completed the assessment under Section 143(3) of the Income Tax Act by rejecting the contention of the assessee and taxed the same. On appeal, the CIT (A) upheld the contention of the assessee. On further appeal filed by the revenue, the Income Tax Appellate Tribunal upheld the order of CIT (A) on the ground that firstly, the sale proceeds were diverted by an overriding the title in favour of the bank and the sale proceeds did not reach the assessee and secondly, the amount paid by the assessee to discharge the debt was an expenditure incurred by the assessee for removing the encumbrance which was absolutely essential to effectively transfer the plot and, therefore, the same was deductible under Section 48 of the Income Tax Act. Challenging the said order, the present appeal is filed by the revenue. In Tax Appeal No.603 of 2000, the Tribunal took contrary view and

held that the amount paid to discharge the debt was neither diverted by overriding title nor such expenditure can be regarded as an expenditure incurred in connection with transfer.

5. Mr.Patil, learned senior advocate appearing on behalf of the assessee submitted that the property owned by the assessee was admittedly subject to the charge of the bank and the said charged property was transferred after obtaining permission from the bank with an express condition that the entire proceeds realised on transfer would be directly paid to the bank to discharge the debt. He submitted that the assessee could not have transferred the charged asset without complying with the conditions imposed by the bank and, therefore, the amount paid to the bank was an expenditure incurred in connection with the transfer of the charged property and, therefore, the said expenditure was deductible under Section 48(i) of the Income Tax Act.

6. Mr.Patil further submitted that Section 48 of the Income Tax Act provides that from the full value of the consideration received or accrued as a result of the transfer of the capital asset, the

expenditure incurred wholly and exclusively in connection with such transfer and also the cost of acquisition and the cost of improvement thereto are liable to be deducted. Mr.Patil relied upon the decision of this court in the case of CIT V/s. Shakuntala Kantilal (190 ITR 56), wherein it is held that the property which is encumbered and without removing that encumbrance the property cannot be transferred, then, the expenditure incurred for removing such encumbrance is an expenditure incurred in connection with the transfer of the property as contemplated under Section 48(i) of the Income Tax Act. He submitted that the aforesaid decision of this court has been followed subsequently in the case of CIT V/s. Abrar Alvi (247 ITR 312). Accordingly, Mr.Patil submitted that the expenditure incurred by the assessee to effectively transfer the asset free from encumbrance was an expenditure covered under Section 48(i) of the Income Tax Act and was, therefore, deductible.

7. Mr.Patil relied upon the decision of the Kerala High Court in the case of CIT V/s. Smt.Thressiamma Abraham (227 ITR 802). In that case, the assessee therein stood as guarantor and mortgaged her property to secure repayment of a loan

taken by an industrial concern from the Kerala Financial Corporation. As the industrial concern failed to repay the debt, the Corporation in exercise of its right under the mortgage, sold the property and appropriated the entire proceeds towards discharge of the loan. The Kerala High Court held that the sale consideration was diverted to the Kerala Financial Corporation by overriding title and as the assessee had not received a pie as a result of the transfer, there was no income much less any capital gains accrued to the assessee. Mr.Patil submitted that the above decision as well as the decisions of this court referred to hereinabove squarely apply to the facts of the present case and, therefore, the question raised in the appeals be answered in favour of the assessee.

8. Mr.Desai, learned senior advocate appearing on behalf of the revenue submitted that in the light of the three decisions of the Apex Court (one) RM. Arunachalam V/s. CIT [227 ITR 222], (two) V.S.M.T. Jagdishchandran (deceased) V/s. CIT [227 ITR 240] and (three) CIT V/s. Attili N. Rao [252 ITR 880], the issue raised in these appeals stands concluded in favour of the revenue. He submitted that in the light of the aforesaid

decisions of the Apex Court, it is not open to the assessee to contend that repayment of the mortgage debt is an expenditure incurred in connection with the transfer of the capital asset and, therefore, allowable under Section 48(i) of the Income Tax Act.

9. In rejoinder, Mr.Patil submitted that in none of the aforesaid cases, the Apex Court has considered the issue of allowing deduction under section 48(i) of the Income Tax Act as an expenditure incurred to remove the encumbrance, which was essential to effectively transfer the mortgaged asset. He submitted that in all the aforesaid cases the Apex Court has considered the issue relating to the diversion of income by overriding title and the issue relating to the cost of acquisition / cost of improvement and, therefore, the decision of the Apex Court in those cases is not applicable to the case of the assessee. He submitted that in the light of the decisions of this Court in the case of Shakuntala Kantilal (supra) followed in the case of Abrar Alvi (supra) and the decision of the Kerala High Court in the case of Smt.Thressiamma Abraham (supra) which are directly applicable to the case of the assessee herein, it must be held that the expenditure incurred to remove

the encumbrance being absolutely essential to effectively transfer the property, such expenditure must be held to be deductible from the computation of capital gains under Section 48(i) of the Income Tax Act.

10. We have carefully considered the rival submissions. As stated hereinabove, the only question required to be considered in these appeals is, whether the repayment of mortgage debt is an expenditure incurred in connection with the transfer of the capital asset allowable under Section 48(i) of the Income Tax Act ?

11. The Apex Court in the case of RM. Arunachalam (supra) while keeping the issue relating to diversion by overriding title open, has held (227 ITR 222 at page 236) as follows :-

> " This would show that a charge differs from a mortgage in the sense that in a mortgage there is transfer of interest in the property mortgaged, while in a charge no interest is created in the property charged, so as to reduce the full ownership to a limited ownership. The creation of a charge under section 74(1) of the Estate Duty Act cannot, therefore, be construed as creation of an interest in property that is the subject-matter of the charge. The creation of the charge under section 74(1) only means that in the matter of recovery of estate duty from the property

> which is the subject-matter of the charge the amount recoverable by way of estate duty would have priority over other liabilities of the accountable person. In that sense the claim in respect of estate duty would have precedence over the claim of the mortgagee because a mortgage is also a charge."
>
> **(emphasis supplied)**

It was further held by the Apex Court (at page 239) as follows :

> "..... in a mortgage there is transfer of an interest in the property by the mortgagor in favour of the mortgagee and where the previous owner has mortgaged the property during his lifetime, which is subsisting at the time of his death, then after his death his heir only inherits the mortgagor's interest in the property. By discharging the mortgage debt his heir who has inherited the property acquires the interest of the mortgagee in the property. As a result of such payment made for the purpose of clearing off the mortgage the interest of the mortgagee in the property has been acquired by the heir. The said payment has, therefore, to be regarded as 'cost of acquisition' under section 48 read with section 55(2) of the Act. The position is, however, different where the mortgage is created by the owner after he has acquired the property. The clearing off of the mortgage debt by him prior to transfer of the property would not entitle him to claim deduction under section 48 of the Act because in such a case he did not acquire any interest in the property subsequent to his acquiring the same."
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> **(emphasis suppied)**

12. In the case of V.S.M.R. Jagdishchandran (supra), the Apex Court while following its decision

in the case of RM Arunachalam (supra) held that where the mortgage is created by the assessee himself, then the expenditure incurred by the assessee to repay the mortgage debt cannot be held to be the cost of acquisition or cost of improvement allowable under Section 48(ii) of the Income Tax Act.

13. Subsequently, the Apex Court in the case of CIT V/s. Attili N. Rao (252 ITR 880) has considered the issue relating to diversion of income by overriding title. In that case the assessee therein had mortgaged immovable property to the State Government as a security for the amounts due to the State. The State Government in exercise of its power under the mortgage, sold the mortgaged property in auction and from the quantum realised, the State deducted the amount due to it and paid over the balance to the assessee. In computing the capital gains accruing on sale of the above property, the assessee claimed deduction of the amount appropriated by the State Government towards the mortgage debt. The Tribunal held that on mortgage created by the assessee, the State Government had an interest in the mortgaged property and on sale of the said property the amount of sale

proceeds to the extent of the mortgage debt was diverted to the State Government by overriding title and the amount paid towards mortgage debt has not reached the hands of the assessee. The above decision of the Tribunal was upheld by the Andhra Pradesh High Court. Reversing the decision of the High Court, the Apex Court held (at page 883) as follows :

> " What was sold by the State at the auction was the immovable property that belonged to the assessee. The price that was realised therefor belonged to the assessee. From out of that price, the State deducted its dues towards "kist" and interest due from the assessee and paid over the balance to him. The capital gain that the assessee made was on the immovable property that belonged to him. Therefore, it is on the full price realised (less admitted deductions) that the capital gain and the tax thereon has to be computed."

14. From the aforesaid decisions of the Apex Court, it is clear that there is a distinction between the obligation to discharge the mortgage debt created by the previous owner and the obligation to discharge the mortgage debt created by the assessee himself. Where the property acquired by the assessee is subject to the mortgage created by the previous owner, the assessee acquires absolute interest in that property only after the interest created in the property in favour of the

mortgage is transferred to the assessee, that is after the discharge of mortgage debt. In such a case, the expenditure incurred by the assessee to discharge the mortgage debt created by the previous owner to acquire absolute interest in the property is treated as 'cost of acquisition' and is deductible from the full value of consideration received by the assessee on transfer of that property. However, where the assessee acquires a property which is unencumbered, then, the assessee gets absolute interest in that property on acquisition. When the assessee transfers that property, the assessee is liable for capital gains tax on the full value (less admitted deductions) realised, even if an encumbrance is created by the assessee himself on that property and the assessee is under an obligation to remove that encumbrance for effectively transferring the property. In other words, the expenditure incurred by the assessee to remove the encumbrance created by the assessee himself on the property which was acquired by the assessee without any encumbrance is not allowable deduction under Section 48 of the Income Tax Act.

15. It is true that in none of the aforesaid cases the Apex Court has specifically held that

repayment of the mortgage debt created by the assessee himself is not an expenditure incurred for effectively transferring the property. However, it is implicitly held by the Apex Court that the expenditure incurred to remove the encumbrance created by the assessee himself on a property on which the assessee had absolute interest is not an expenditure incurred for effectively transferring the property as contemplated under Section 48 of the Income Tax Act. It is not in dispute that in both the appeals which are before us, the property on which the encumbrance was created by the assessee was acquired by the assessee free from encumbrances. Therefore, in the light of the decisions of the Apex Court referred to hereinabove, it must be held that the assessee is not entitled to the deduction of the expenditure incurred to remove the encumbrance created by the assessee himself.

16. The contention that the assessee has not received a pie from the transfer and the entire sale proceeds realised on transfer of the mortgaged asset has been appropriated towards discharge of mortgage is also without any merit. As held by the Apex Court, when the property belonging to the assessee is sold in discharge of the mortgage created by the

assessee himself, then, irrespective of the amount actually received by the assessee, the capital gain has to be computed on the full price realised (less admissible deduction) on transfer of the asset. To illustrate, suppose the assessee mortgages its capital asset and obtains loan of Rs.1 lakh from a Bank. Thereafter if the assessee transfers the said capital asset with the consent of the bank for Rs.1 lakh and pays the entire amount of Rs.1 lakh to the bank to discharge the mortgage created by the assessee, then it is not open to the assessee to contend that the capital gains tax is not leviable on transfer of the property because the assessee has not received a pie on transfer of that capital asset.

17. As regards the decisions of this court in the case of Shakuntala Kantilal (supra) followed in the case of Abrar Alvi (supra) and the decisions of the Kerala High Court in the case of Smt.Thressiamma Abraham (supra) which are strongly relied upon by the counsel for the assessee, we are of the opinion that the said decisions are no longer good law in the light of the subsequent decisions of the Apex Court referred to hereinabove.

18. For all the aforesaid reasons, we answer question set out at para 2 in the negative i.e. in favour of the revenue and against the assessee.

19. Accordingly, the appeal No.755 of 2000 filed by the revenue is allowed and the appeal No.603 of 2000 filed by the assessee is dismissed. However, there will be no order as to costs.

(S. RADHAKRISHNAN, J.)

(J.P. DEVADHAR, J.)